

DISTRICT OF NEVADA

Defendants

In this civil-rights case, plaintiff Samuel Joseph Gizzie sues the Las Vegas Metropolitan Police Department (LVMPD), Officer Francisco Mazon, and John Does, claiming that he was legally promoting strip clubs when LVMPD officers used excessive force to get him to leave the sidewalk in front of the Flamingo Hotel and Casino.¹ Defendants move to dismiss Gizzie's late-filed second amended complaint in which he attempts to join Antonio Luis Freire as co-plaintiff and alleges that the Flamingo conspired with LVMPD to harass promoters like him.² Defendants also move for summary judgment on the civil-rights claims in Gizzie's first amended complaint.³ I treat defendants' motion to dismiss as a one to strike, and because Gizzie did not obtain leave to file his second amended complaint, I strike it from the record as a rogue pleading. I also grant the defendants' summary-judgment motion because Gizzie has not submitted any evidence to discharge his burden of showing that triable issues of fact exist in this case. So I enter judgment in the defendants' favor and close this case.

³ ECF No. 41 (motion for summary judgment).

Background

On April 16, 2018, Gizzie and Freire were on the Las Vegas Strip in front the Flamingo Hotel and Casino promoting strip clubs, night clubs, massage parlors, and outcall promotions.⁴ After LVMPD officers approached the two men and separated them, Officer Mazon informed Freire that he had “solicited the service of girls to undercover officers earlier.”⁵ Mazon told Freire that he could leave the area but that Mazon would arrest Freire if he saw him soliciting again that night.⁶ Freire agreed to leave, but stated that he had to wait for Gizzie, who was his ride.⁷ Gizzie sues Mazon and LVMPD, alleging that he has a business license to promote on the Strip and that the four officers unjustifiably harassed and physically moved him off of the property.⁸

In June 2018, after this court screened and dismissed Gizzie’s original complaint with leave to amend, he filed an amended complaint asserting causes of action against LVMPD, Officer Mazon, and John Does for violations of his constitutional rights under 42 U.S.C. §1983, municipal liability under *Monell v. Department of Social Services*,⁹ and various state laws.¹⁰ He seeks one million dollars in damages for psychological and emotional injuries, despite acknowledging that he suffered no physical injuries—not even a bruise—from Officer Mazon allegedly touching his shoulder.¹¹

⁴ ECF No. 41-3 (Gizzie’s answers to defendants’ requests for admission).

⁵ ECF No. 41-1 (internal investigation report).

⁶ *Id.*; ECF No. 41-2.

⁷ ECF No. 41-2 (Mazon’s body-camera footage).

⁸ ECF No. 5 at 4–5.

⁹ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

¹⁰ ECF Nos. 1 (original complaint), 3 (screening order), 5, 6 (second screening order).

¹¹ ECF No. 5 at 5.

1 In November 2018, the magistrate judge entered a scheduling order that set December 4
2 as the deadline for amending the pleadings or adding parties.¹² The following March, the
3 magistrate judge granted the parties' stipulation to extend various deadlines, none of which
4 affected the since-passed deadline for amending the pleadings or adding parties.¹³ Nonetheless,
5 Gizzie filed a second amended complaint on May 17 in which he seeks to join Freire as a co-
6 plaintiff and asserts additional claims against the Flamingo for conspiring with LVMPD to
7 falsely arrest and intimidate him and Freire.¹⁴

8 Discovery continued. The magistrate judge granted the parties' second stipulation to
9 extend time and set the discovery cut-off deadline for July 1, 2019.¹⁵ Gizzie didn't respond to
10 the defendants' interrogatories, and he failed to appear for his scheduled deposition on July 1.¹⁶
11 Gizzie emailed the defendants' counsel five hours before the deposition stating that he would not
12 be appearing at the deposition.¹⁷ The defendants waited for 30 minutes that morning before they
13 started the deposition and had the court reporter they hired note Gizzie's failure to appear for the
14 record.

15 Discussion

16 I. Gizzie's second amended complaint is a rogue filing, so I strike it from the record.

17 The defendants move to dismiss Gizzie's second amended complaint based on a number
18 of procedural deficiencies—they argue that he filed it out without leave of the court; after the
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20 ¹² ECF No. 20 (scheduling order).

21 ¹³ ECF No. 24 (order granting stipulation to extend time).

22 ¹⁴ ECF Nos. 26 (joinder), 27 (second amended complaint).

23 ¹⁵ ECF No. 30.

¹⁶ ECF No. 41-4 (notice of deposition).

¹⁷ ECF No. 41-9 (declaration of Ryan W. Daniels).

1 deadlines for amending pleadings, adding parties, and discovery; and without good cause for the
2 delay, among other reasons.¹⁸ Gizzie does not meaningfully oppose the motion, he “stipulates
3 that those cases [that] the [d]efendant[s] . . . cited as reasons why the delay is odious[,] and
4 should the case be dismissed[,] are reasonable under the circumstances.”¹⁹ Instead, he argues
5 that the defendants failed to produce the body-camera footage for ten officers that he requested a
6 year ago and, depending on what that footage contains, there are still claims that he wants to add
7 in a “Revised Complaint.”²⁰

8 Federal Rule of Civil Procedure 15 provides that a party may amend his pleading once as
9 a matter of course within 21 days of service of a responsive pleading. Later amendments require
10 leave from the court or the opposing party’s consent.²¹ Rule 12(f) permits courts to “strike from
11 a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
12 matter.” The district court also has inherent authority to strike improper filings “to promulgate
13 and enforce rules for the management of litigation”²²

14 Gizzie did not comply with Rule 15’s requirements for amended pleadings, and he makes
15 no argument in his response to explain his noncompliance. In fact, he appears to agree that
16 dismissal is “reasonable under the circumstances.” Because Gizzie filed his second amended
17 complaint without leave, it is a rogue document, I construe the defendants’ motion to dismiss
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21 ¹⁸ ECF No. 31.

22 ¹⁹ ECF No. 34 (response to motion to dismiss).

23 ²⁰ *Id.*

²¹ Fed. R. Civ. P 15(a)(2).

²² *Spurlock v. F.B.I.*, 69 F.3d 1010, 1016 (9th Cir. 1995) (citations omitted).

1 more properly as one to strike, and I strike the second amended complaint. Gizzie's first
2 amended complaint²³ continues to be the operative complaint in this case.

3 **II. The defendants are entitled to summary judgment on Gizzie's federal claims**
4 **because he has shown no genuine issue of material fact.**

5 Defendants supply two reasons why I should close this case. They ask me to sanction
6 Gizzie under Rule 37 by dismissing his complaint or prohibiting him from his supporting his
7 claims because Gizzie no-showed for his deposition and failed to answer defendants'
8 interrogatories.²⁴ Alternatively, they ask me to enter summary judgment in their favor because:
9 (1) there is no evidence that Officer Mazon touched Gizzie or commanded him to leave the
10 Flamingo, (2) Officer Mazon would be entitled to qualified immunity if he had, (3) there is no
11 evidence that LVMPD had an unconstitutional policy or practice of deliberate indifference, and
12 (4) any claims by Freire fail because he is not a party to this case.²⁵ I address only the first and
13 third summary-judgment arguments because, as I explain below, Gizzie hasn't shown that
14 Officer Mazon used excessive force and because Gizzie's rogue attempt to join Freire as co-
15 plaintiff in this case failed.

16 In his two-page opposition, Gizzie responds that the defendants' motion "is void as
17 [h]earsay" because defendants didn't attach an affidavit from any of the ten involved officers in
18 support of the motion.²⁶ Not so. Rule 56(c)(2) and (4) allow courts to consider affidavits or
19 other evidence that "would be admissible in evidence." And, here, the defendants submitted
20 affidavits from Officer Mazon, which explains that the body-camera footage doesn't show him

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22 ²³ ECF No. 5.

23 ²⁴ ECF No. 41 at 17.

²⁵ *Id.* at 18–28.

²⁶ ECF No. 44.

1 touching Gizzie, and a declaration from Ryan W. Daniels, defendants’ counsel, detailing
2 Gizzie’s failure to participate in discovery.²⁷

3 “‘[T]he burden on the moving party may be discharged by showing—that is, pointing out
4 to the district court—that there is an absence of evidence to support the nonmoving party’s
5 case.’”²⁸ The defendants have met that burden here: they submitted the internal-affairs-
6 investigation report and surveillance footage for the incident, among other evidence, in support
7 of their motion. On the other hand, Gizzie has not supplied any evidence to show that there is
8 evidence to support any of his claims. Gizzie alleged that Officer Mazon used excessive force to
9 remove him from property and threatened him with jail time if he didn’t leave, but the
10 surveillance video shows that Officer Mazon made that comment to Freire, out of Gizzie’s
11 presence, and that Officer Mazon didn’t touch Freire.²⁹ The declaration Gizzie attached to his
12 first amended complaint in which he avers that Officer Mazon touched and threatened him is not
13 supported by evidence in the record.³⁰ This uncorroborated and self-serving declaration fails to
14 nudge his claims over the triable-issue-of-fact threshold as a matter of Ninth Circuit law.³¹

15 There is also no evidence to support Gizzie’s policy-and-custom claim against LVMPD
16 under *Monell*.³² For *Monell* liability to attach, the challenged action must be the standard
17 operating procedure of the municipality, not merely a single occurrence by a non-policymaking

18 ²⁷ ECF Nos. 41-9, 41-10.

19 ²⁸ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (quotation omitted).

20 ²⁹ ECF No. 41-2.

21 ³⁰ See ECF No. 5-1.

22 ³¹ See *Dubois v. Ass’n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1180 (9th Cir.
23 2006) (“Plaintiffs’ exhibits were largely irrelevant or insufficient, leaving as the only other
‘evidence’ their uncorroborated and self-serving declarations, which alone do not create any
genuine issues of material fact.”).

³² *Monell*, 436 U.S. at 690–91.

1 employee.³³ Gizzie’s complaint relies on a single interaction with LVMPD, and though his
2 experience may have “[led him] to believe” that LVMPD has a pattern or practice of threatening
3 similar promoters, he has not submitted any evidence to support that theory.

4 **III. The court declines supplemental jurisdiction over Gizzie’s state-law claims.**

5 Having granted defendants summary judgment on Gizzie’s federal claims, there is no
6 federal-jurisdictional anchor to support Gizzie’s state-law claims.³⁴ Because Gizzie has not
7 defended or supported his state-law claims in response to this summary-judgment motion, I
8 decline to exercise supplemental jurisdiction over them. So I dismiss the state-law claims
9 without prejudice to Gizzie’s ability to refile them in state court.³⁵

10 **Conclusion**

11 **IT IS THEREFORE ORDERED** that the defendants’ motion to dismiss plaintiff’s
12 second amended complaint [ECF No. 31], which the court construes as a motion to strike, **is**
13 **GRANTED.** Plaintiff’s second amended complaint [ECF No. 27] is struck from the docket.

14 **IT IS FURTHER ORDERED** that the defendants’ motion for summary judgment [ECF
15 No. 41] **is GRANTED.** Summary judgment is entered in favor of the defendants on the federal-
16 law claims, and the court declines to retain supplemental jurisdiction over the state-law claims,
17 which are hereby dismissed without prejudice to Gizzie’s ability to refile the state-law claims in
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20 ³³ See *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1249 (9th Cir. 2010), *overruled on other*
21 *grounds by Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016); *City of Okla. v.*
Tuttle, 471 U.S. 808, 823–24 (1985).

22 ³⁴ *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725–26 (1966) (providing that federal
23 courts exercise their discretion to deny pendent jurisdiction over state law claims, especially
where it dismisses the federal claims before trial).

³⁵ *Id.*

1 state court.³⁶ The Clerk of Court is directed to **ENTER FINAL JUDGMENT** in favor of the
2 defendants accordingly and **CLOSE THIS CASE**.

3 Dated: February 7, 2020

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5 U.S. District Judge Jennifer A. Dorsey
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23 ³⁶ Gizzie is cautioned that deadlines may be running on those claims. *See, e.g.*, 28 U.S.C.
§ 1367(d).